SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1966

No. 272

EDWARD M. GILBERT,

Petitioner,

against

SUPREME COURT OF THE STATE OF NEW YORK, CRIMINAL TERM, COUNTY OF NEW YORK, THE SEVERAL JUDGES THEREOF, INDIVIDUALLY AND AS JUDGES OF THE SAID SUPREME COURT, CRIMINAL TERM, COUNTY OF NEW YORK, and FRANK S. HOGAN, DISTRICT ATTORNEY, COUNTY OF NEW YORK, AND HIS REPRESENTATIVES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTION PRESENTED	4
STATEMENT	5
A. Prior Proceedings	5
B. The Facts	6
POINT I—By his plea of guilty to the crime of wire fraud in federal court, prosecution of the petitioner in New York for the crime of larceny is not barred on the grounds of former jeopardy	8
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:

Bartkus v. Illinois, 359 U. S. 121 (1959)	8
Blockburger v. United States, 284 U. S. 299, 302 (1932)	12
Cichos v. Indiana, —— U. S. ——, 86 S. Ct. 1270 (1966)	8
Commonwealth v. Ponzi, 152 N. E. 307, 256 Mass. 159 (1926)	9
Dunham v. United States, 125 F. 2d 895 (5th Cir. 1942)	9

PAGE

Ebeling v. Morgan, 237 U. S. 625 (1915) 11, 19

Gavieres v. United States, 220 U. S. 338, 342 (1911) .. 12

Hoag v. New Jersey, 356 U. S. 464, 467 (1958) 19
Huff v. United States, 301 F. 2d 760, 765 (5th Cir. 1962) 14

Matter of Martinis v. Supreme Court, 15 N. Y. 2d 240 (1965) 10, 12
Morgan v. Devine, 237 U. S. 632 (1915) 11, 17

People v. Adamchesky, 184 Misc. 769 (Gen. Sess. N. Y. Co. 1945) 9, 15
People ex rel. Maurer v. Jackson, 2 N. Y. 2d 259, 264 (1957) 11, 18
People v. Gilbert, 44 Misc. 2d 318 (1964) 1, 6
People v. LoCicero, 14 N. Y. 2d 374 (1964) ..11, 13, 15, 16, 19
People v. Palmisano, 132 Misc. 244 (Mag. Ct., Kings Co. 1928) 16
People v. Silverman, 281 N. Y. 457, 462 (1939) 17
People v. Skarczewski, 178 Misc. 160 (Monroe Co. 1941), aff'd, 287 N. Y. 826 (1942) 13
People v. Snyder, 241 N. Y. 81 (1925) 11, 17
People v. Tavormina, 257 N. Y. 84 (1931) 16
Pereira v. United States, 347 U. S. 1, 9 (1954) 12, 13

United States v. Adams, 281 U. S. 202 (1930) 19
United States v. Bagdasian, 291 F. 2d 163 (9th Cir. 1961) 14, 17
United States v. Crosby, 924 F. 2d 928, 947 (2d Cir. 1961) 17
United States v. Dougherty, 269 U. S. 360 (1926) 19
United States v. Michener, 331 U. S. 789 (1946) 19
United States v. Painter, 314 F. 2d 939 (4th Cir. 1963) 14, 17

PAGE

United States v. Sutton, 245 F. Supp. 357 (D. C. Md. 1965) 9, 15, 19
United States v. Whitney, 308 F. 2d 537 (2d Cir. 1962), cert. den. 372 U. S. 909 (1962) 14

Constitution and Statutes:

New York Code of Criminal Procedure, Sec. 139 ..... 4, 5, 8, 10
New York Penal Law, Sec. 1290 ..... 2, 14
New York Penal Law, Sec. 1294 ..... 3, 5
New York Penal Law, Sec. 33 ..... 4, 5
New York State Constitution, Article I, Sec. 6 ..... 3, 10
United States Code, Title 18 Sec. 1343 ..... 2, 5, 8
United States Code, Title 18 Sec. 1341 9
United States Const. Amend. V 2, 9, 10

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Opinions Below

The opinion of the Supreme Court of the State of New York, denying the motion to dismiss the indictment on the grounds of double jeopardy, is reported at 44 Misc. 2d 318.

The Appellate Division of the New York Supreme Court, First Department, denied an article 78 proceeding in the nature of prohibition without opinion.

The New York Court of Appeals affirmed the order of the Appellate Division without opinion.

Statutory and Constitutional Provisions Involved

United States Constitution, Amend. V:

> "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *"

Title 18 U. S. C. §1343. Fraud by wire, radio or television.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Penal Law §1290 (State):

> "A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other

person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

"Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:

"1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

"2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

"3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title."

Penal Law §1294 (State): Grand Larceny in first degree.

"A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

"Subd. 3

"Property of the value of more than five hundred dollars, in any manner whatever."

New York State Constitution, Article I, Section 6:

"No person shall be subject to be twice put in jeopardy of the same offense."

Penal Law §33 (State): Foreign conviction or acquittal a defense.

> "Whenever it appears upon the trial of an indictment, that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state, or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense."

Code of Criminal Procedure §139 (State): Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent.

> "When an act charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this state."

Question Presented

Does the Fifth Amendment bar against double jeopardy apply where successive state and federal prosecutions are maintained for crimes dissimilar in law and fact?

Statement

A. Prior Proceedings

On June 28, 1962, a fifteen-count indictment was filed against the petitioner in the United States District Court for the Southern District of New York relating to the misappropriation of corporate funds and violations of Securities laws (13-19).*

On July 9, 1962, a New York County grand jury indicted Gilbert for twelve counts of grand larceny in the first degree [Penal Law §1294] (20-5).

On October 9, 1962, Gilbert pleaded not guilty to both indictments. However, on September 25, 1964, he withdrew his plea of not guilty to the federal charge, and entered a plea of guilty to counts 1, 5 and 7. Count 1 of the federal indictment, the count relevant to this case, charged the petitioner with a violation of 18 U. S. C. 1343, Fraud by Wire, Radio or Television. Gilbert is currently awaiting sentence on that plea.

On October 9, 1964, petitioner entered the additional plea in the New York Supreme Court of not guilty by reason of previous conviction. Subsequently, petitioner moved in the State Supreme Court to dismiss the indictment under Section 139 of the Code of Criminal Procedure and Section 33 of the Penal Law, both sections prohibiting a defendant from being twice put in jeopardy. That mo-

* References, unless otherwise indicated, are to the printed record on appeal.

tion was denied on November 6, 1964, pursuant to an opinion delivered by Justice Dickens (26-34; 44 Misc. 2d 318).

Thereafter, Gilbert applied to the Appellate Division pursuant to Article 78 of the Civil Practice Laws and Rules for an order prohibiting the respondents from prosecuting the petitioner for grand larceny in the first degree. The application was denied on April 13, 1965 (3-4) and the New York Court of Appeals affirmed the denial on March 31, 1966.

B. The Facts

In the latter part of 1961, the petitioner was President of E. L. Bruce Company, Inc. (7). At that time, Bruce decided to acquire the Celotex Corporation, and Gilbert personally began to purchase a large number of Celotex shares through his own wholly-owned corporation, Rhodes Enterprises, Inc., Bruce being given an option to buy the Celotex shares for the same price paid by Gilbert (7).

On May 28, 1962, the stock market "suffered a severe break" (7). Beset with margin calls and the possibility of being sold out if the calls were not met, Gilbert decided "the only chance of preserving the situation seemed to lay in withdrawing monies from Bruce to meet these margin calls" (7-8). Consequently, between May 28 and June 6, 1962, the petitioner made unauthorized withdrawals of $1,958,000 by drawing checks on the account of Bruce and depositing the funds in the account of either Rhodes or

Empire Hardwood Flooring Corporation (8, 37-8). The dates, amounts, and payees, of these checks are as follows:

Check #	*Date*	*Amount*	*Payee*
256	May 28, 1962	$50,000	Rhodes Enterprises, Inc.
257	May 29, 1962	$200,000	Empire Hardwood Flooring Corp.
258	May 29, 1962	$205,000	Empire Hardwood Flooring Corp.
2146	May 29, 1962	$340,000	Rhodes Enterprises, Inc.
2151	June 1, 1962	$490,000	Rhodes Enterprises, Inc.
2163	June 1, 1962	$126,000	Rhodes Enterprises, Inc.
2168	June 5, 1962	$100,000	Rhodes Enterprises, Inc.
2170	June 6, 1962	$160,000	Rhodes Enterprises, Inc.
2174	June 6, 1962	$287,000	Rhodes Enterprises, Inc.

All of these checks cleared the banks and were charged against the account of E. L. Bruce Company (38).

After credit balances has been thus established in the accounts of Rhodes and Empire Hardwood, Gilbert used all the money, with the exception of $5,000 returned to Bruce, to meet margin calls or pay other obligations (8, 38). A chart of the checks drawn, the amounts, and the payees appears in the affidavit of Jerome Kidder in the record on appeal (39-40). One of these payments was made by cable on May 29, 1962, to Financiere DuMont-Blanc in Geneva, Switzerland, this transaction in foreign commerce being the basis of the wire fraud charge appearing in Count 1 of the federal indictment (14).

POINT I

By his plea of guilty to the crime of wire fraud in federal court, prosecution of the petitioner in New York for the crime of larceny is not barred on the grounds of former jeopardy [answering petitioner's brief].

During the months of May and June, 1962, the petitioner misappropriated almost two million dollars from two corporations and used the money to satisfy creditors' claims upon him, the petitioner paying his debts in at least one instance by cabling funds to a foreign concern in Geneva. Subsequently indicted by both federal and state authorities, Gilbert pleaded guilty in federal court to the crime of wire fraud [18 U. S. C. 1343], thereby acknowledging that he used interstate or foreign wire facilities to transmit funds acquired by a scheme to defraud. By an article 78 proceeding in the nature of prohibition, the petitioner sought to abort prosecution in New York for larceny of the money, raising in defense a claim of double jeopardy.

Of course, there is at present no constitutional bar to successive state and federal prosecutions for the same crime [*Bartkus* v. *Illinois*, 359 U. S. 121 (1959)]. And while this Court has granted certiorari in *Cichos* v. *Indiana* [—— U. S. ——, 86 S. Ct. 1270 (1966)] to reconsider *Bartkus*, the outcome of *Cichos* can have no bearing on the present case. For New York has its own "barring" statute [Code Crim. Proc. §139] which grants protection from prosecution by two sovereigns fully as extensive as the

Fifth Amendment bar applied in federal courts. And under both New York and federal law it is quite apparent that larceny and wire fraud are legally and factually dissimilar.

Indeed, several indistinguishable cases confirm that successive prosecutions for wire fraud and larceny are proper. In *Commonwealth* v. *Ponzi* [152 N. E. 307, 256 Mass. 159 (1926)] the defendant pleaded guilty in federal court to mail fraud [18 U. S. C. 1341], an analogous statute requiring a scheme to defraud and use of mails instead of wires. State prosecution for larceny of the same funds involved in the scheme was allowed despite a plea of former jeopardy. In *Dunham* v. *United States* [125 F. 2d 895 (5th Cir. 1942)] an acquittal in state court for embezzlement was held to be no bar to subsequent federal prosecution for mail fraud. In *United States* v. *Sutton* [245 F. Supp. 357 (D. C. Md. 1965)] federal prosecution for transporting falsely-made money orders across state lines was deemed permissible after an acquittal in state court for larceny of the same money orders. And in *People* v. *Adamchesky* [184 Misc. 769 (Gen. Sess. N. Y. Co. 1945)] a defendant pleaded guilty in federal court to transporting stolen property across interstate lines. His plea of former jeopardy to a prosecution in New York for larceny of that property was rejected, the two crimes being held to be dissimilar in law.

Apart from principles of *stare decisis,* examination of the law of double jeopardy reveals clearly that these holdings were correctly founded. As a starting point, the United States Constitution and the Constitution of New York State both decree that a man may not be tried twice for the same "offense" [U. S. Const. Amend.

V; New York Const. Art. I, Sec. 6]. Section 33 of the Penal Law, however, establishes the plea of former jeopardy as a valid defense in a second trial for the same "offense" or "act." And New York's "barring" statute [Code Crim. Proc. §139] prohibits prosecution based on a former trial for the same "act charged as a crime." Additionally, the opinions of the Court of Appeals in the recent case of *Matter of Martinis* v. *Supreme Court* [15 N. Y. 2d 240 (1965)] discuss double jeopardy in terms of the "offense" [opinion of Judge Dye, *id.* p. 249], "acts" [opinion of Judge Fuld, *id.* p. 252; opinion of Judge Burke, *id.* pp. 251-2], and "evidence" [opinion of Judge Burke, *id.* p. 252]. Consequently, it becomes necessary to discover the relationship between the offense, acts, and evidence, especially in view of petitioner's assertion that there are "only two tests" applicable to the issue of double jeopardy: the "same acts" test and the "same evidence" test (brief, p. 8).

Analysis shows, however, that these three standards are in reality aspects of one test of double jeopardy.

Essentially double jeopardy is a behavioral concept in that identical actions, denominated different crimes, cannot be consecutively punished. Yet an action-complex may contain severable acts, each of which is a separate crime subject to separate punishment. Therefore the statutory description of the acts constituting the offense is an indispensable consideration in the determination. Usually, the test is phrased in terms of whether there occurred a "single inseparable act" or "separate and distinct acts" violating more than one statute [*e.g., People*

ex rel. Maurer v. *Jackson,* 2 N. Y. 2d 259, 264 (1957)]. If the former, the defense of double jeopardy would be sustained; if the latter, it would not. Obviously, then, the real question becomes what is an "act," for conduct may be logically subdivided into any number of component parts in much the same way as physical matter may be viewed as a combination of molecules, or elements, or atoms, depending on the observer's point of view. Clearly, some subdivisions of human conduct are relevant to the criminal law and some are not. But only the criminal statute which defines the relevant acts can decide this question. For instance, at common law, burglary and the larceny following the entry were viewed as one single act, open to only one prosecution and one punishment. But in defining criminal offenses, legislatures have resolved that transaction into two crimes, and thus into two relevant acts, each of which became subject to prosecution [see, *People* v. *Snyder,* 241 N. Y. 81 (1925); *Morgan* v. *Devine,* 237 U. S. 632 (1915); also see, *Ebeling* v. *Morgan,* 237 U. S. 625 (1915)]. Consequently, without reference to the offense involved, the same act "test" is virtually meaningless, for otherwise there is no way of telling whether a transaction is one "act," or whether a single transaction may be divided into legally separate "acts." This is not to say, however, that the language of the statutes is completely decisive of a double jeopardy claim, for, under some circumstances, two different offenses may be completely satisfied by one action. For example, in *People* v. *LoCicero* [14 N. Y. 2d 374 (1964)] the defense of double jeopardy was sustained where the statutory language of the two offenses was different, but where the act of robbing a truck itself resulted in obstructing interstate commerce.

Thus, the act and the offense are mutually complementary aspects utilized to determine double jeopardy, and not exclusive categories as implied by petitioner. Indeed, in *Matter of Martinis* the opinion of Judge Dye pointed out that there is no "conflict of meaning as to double jeopardy 'for the same offense' * * * and the 'same act or omission'" [15 N. Y. 2d 240, 249, *supra*]. The same evidence "test", furthermore, is simply another cooperating factor involved in the determination, for as the offense defines the acts which constitute the crime, by the same token it also suggests the proof that will satisfy the statute. Of course, use of the same evidence test implies that only the evidence essential to meet the elements of the statute will be considered in determining double jeopardy, for obviously the same evidence presented at a trial may describe two separate crimes, such as burglary and an ensuing larceny.

Thus, combining the factors of offense, act, and evidence, a test of double jeopardy has been expressed as follows:

> "The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not" [*Blockburger* v. *United States,* 284 U. S. 299, 302 (1932)].
>
> "A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution or punishment under the other" [*Gavieres* v. *United States,* 220 U. S. 338, 342 (1911); also see *Pereira* v. *United States,* 347 U. S. 1,

9 (1954); *People* v. *Skarczewski*, 178 Misc. 160 (Monroe Co. 1941), aff'd, 287 N. Y. 826 (1942)].

It may be noticed, however, that the view in New York, manifested particularly in *LoCicero*, may perhaps necessitate a subtle but important change in this definition. Although double jeopardy would have also attached under the Supreme Court standard, only one of the statutes involved requiring an additional fact, this Court concentrated its attention solely on the acts committed, deeming unimportant the additional "fact" that the hijacked truck had to be in interstate commerce to satisfy the federal crime. Thus, *LoCicero* may now make it necessary for each statute to require proof of an additional "act," rather than an additional "fact," which the other does not, for a finding of dissimilarity.

The crux of the problem is simply an exploration of the essential nature of dissimilarity. For, regardless of the formulae employed or the tests variously labelled, it is apparent that the courts are seeking a fair solution which would bar multiple prosecution or punishment for crimes sufficiently similar to be legally the same. No problem occurs when the identity is complete, as there is no problem when no features are held in common. Between these poles, however, the difficulties abound. A simple and logical description of similarity would hold to be substantially identical those crimes with elements in common if only one of them has a unique additional element. These are, in effect, the "lesser included crimes" where the greater wholly encompasses the lesser, but requires proof of an additional element, and prosecution for either bars subsequent jeopardy for the other. However, where each of

the crimes has an essential element not shared by the other, they may be said to be distinct, despite other elements they may share. Thus separated by their distinctive aspects, they are sufficiently dissimilar to be different crimes, separately subject to prosecution.

In the present case, analysis of the statutes makes it quite clear that the federal and state laws involved are entirely distinct, each one requiring proof of an act or element not necessary to sustain the other. Clearly, the federal crime of wire fraud requires no proof of caption or asportation. In *United States* v. *Bagdasian* [291 F. 2d 163 (4th Cir. 1961)] the court noted:

> "As to the indictment, it was pointed out preliminarily that it does not allege that the defendant converted to his own use, but the short answer is that it is not an essential part of the crime of devising a fraudulent scheme and using interstate wire facilities for the purpose of executing such scheme" [*id.* at 164; also see, *United States* v. *Painter,* 314 F. 2d 939 (4th Cir. 1963)].

Indeed, even if the scheme were unsuccessful and the larceny never occurred, a conviction could have been obtained under the federal statute [*Huff* v. *United States,* 301 F. 2d 760, 765 (5th Cir. 1962); *United States* v. *Whiting,* 308 F. 2d 537 (2d Cir. 1962), cert. den. 372 U. S. 909 (1962)]. Conversely, to prove an actual larceny, it is not necessary to show either of the two elements required by the federal statute: a scheme to defraud and use of interstate or foreign wire facilities [Penal Law §1290].

Moreover, the factual circumstances of the present case show just as clearly that the two crimes are dissimilar.

Gilbert, by making unauthorized withdrawals of funds and depositing them in his own account, committed larceny. At that point he became subject to state prosecution, but he did not violate the federal law. Federal jurisdiction attached later, when Gilbert used the wires to send the stolen money to a European concern. This means of disposing of the loot, crucial to the federal crime, was legally and factually inessential to the state crime of stealing [*People* v. *Adamchesky,* 184 Misc. 769, *supra; United States* v. *Sutton,* 245 F. Supp. 357, *supra*].

Nevertheless, the petitioner claims that the two crimes are really one, arguing that the use of the wires is merely a jurisdictional handle irrelevant to the nexus of the crime, and that devising a scheme to defraud is substantially identical to larceny. He is, however, mistaken on both accounts. While at first glance *People* v. *LoCicero* [14 N. Y. 2d 374, *supra*] seems to offer some support for his assertion, a closer inspection shows that the present case is entirely distinguishable. In *LoCicero* the defendant was acquitted in Federal Court for obstructing interstate commerce, the result of robbing a truck. Nevertheless, the fact that the federal statute required interstate transportation and the state crime did not was disregarded by the Court of Appeals. Instead, the Court found that the same act of holding up the truck was the essential feature of both the state and federal charges, the robbery itself constituting the obstruction. The additional element that the truck was in interstate commerce "does not diminish the substantial identity of the two charges" [*id.* at 379]. However, in *LoCicero* the element of interstate transportation was purely incidental to the act done by the de-

fendant, being solely a jurisdictional fact required for federal prosecution. Here, however, while it may be similarly incidental that the wires used by the defendant were interstate facilities, the use of the wires itself is still a crucial element in the crime. Indeed, the use of wires is an additional affirmative act done by the defendant, and a *sine qua non* for committing the federal violation. Thus, the jurisdictional handle here is not the act of using the wires, but the fact that the wires were in interstate or foreign commerce. In other words, if the state crime involved in the present case were larceny by wire, the fact that an interstate wire was used would not diminish the substantial identity of the charges, *LoCicero* becoming appropriate. But obviously the state crime of larceny does not require that wires be used at all.

Moreover, there is also a lack of similarity between devising a scheme to defraud and larceny. Devising the plan is only a step, and not always a necessary step, in preparation for larceny. The act of devising therefore is not essential to prove the state crime, in the same way as larceny is not essential to prove the formulation of a scheme. Rather, devising the plan is closely analogous to a conspiracy to commit larceny, a crime open to separate prosecution and punishment beyond the larceny itself [*People* v. *Tavormina*, 257 N. Y. 84 (1931); *People* v. *Palmisano*, 132 Misc. 244 (Mag. Ct., Kings Co., 1928)].

Nevertheless, insisting that devising a scheme to defraud and larceny are substantially the same, the petitioner cites the fact that the federal indictment mentioned

the larceny, and presumably would have offered evidence of larceny had the case gone to trial, and reasons that the "same evidence test" makes the crimes one. However, the fact that the larceny was pleaded in the federal indictment does not render it an essential element of wire fraud, for the statute and authorities show it is not [*United States* v. *Bagdasian,* 291 F. 2d 163, *supra; United States* v. *Painter,* 314 F. 2d 939 (4th Cir. 1963)]. Indeed, even if the federal prosecutor erroneously thought it was essential, the test for double jeopardy purposes is not controlled by the theory of the pleader, but by the requirements of the statute [*People* v. *Silverman,* 281 N. Y. 457, 462 (1939)]. At any rate, its presence in the federal charge and its use on a trial would be well advised, since proof of larceny is, of course, both relevant and admissible evidence relating to the crime of wire fraud, the taking of property being probative to show the devising of a scheme to take it, as well as showing the criminal intent underlying the scheme. [*United States* v. *Crosby,* 294 F. 2d 928, 947 (2d Cir. 1961); *United States* v. *Painter,* 314 F. 2d 939, 942 n. 5, *supra*]. Thus, while the same larcenous act was charged in both indictments, proof of it is essential only to the state crime, its use in the federal prosecution being unrequired but helpful. The same evidence standard, of course, is limited to the same evidence essential to prove the crimes, and can not operate to make offenses identical where its use on one trial is only corroborative or probative.

Still, petitioner argues that the whole transaction—the devising of a scheme and the larceny and the use of the wires—is one inseparable act, claiming that the continuing

criminal intent binds the two aspects together for double jeopardy purposes. Further, he regards criminal intent itself as essential to both crimes, and views the offenses identical on that ground also. It should be remembered, however, that it is not relevant that the larceny and the devising of a scheme to defraud may have been part of the same over-all transaction. As stated in *People ex rel. Mauer* v. *Jackson* [2 N. Y. 2d 259 (1957)]:

> "It is clear that if separate and distinct acts were committed, and that they violated more than one section of the Penal Law, punishment for each of them would be proper although they arose out of a single transaction" [*id.* at 264].

The relevant statutes, of course, define whether the transaction is one "act" or several. Here, the existing laws proscribe separate steps in the transaction, the state law prohibiting the taking of the property, while the federal law bans the devising of the scheme and use of the wires to dispose of it.

The aspect of continuing criminal intent, moreover, certainly does not bind two separable acts together for double jeopardy purposes. Manifestly, the same criminal intent joins a burglary and larceny committed during one transaction, but both this Court and the New York Court of Appeals have held permissible successive prosecution or punishment for both crimes [*People* v. *Snyder,* 241 N. Y. 81, *supra; Morgan* v. *Devine,* 237 U. S. 632 (1915)]. Indeed, in *Morgan* v. *Devine,* the Supreme Court considered the argument now advanced by petitioner, and decided that a continuous and similar intent is irrelevant to whether the acts were separate or one.

"But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable" [237 U. S. at 640, *supra;* also see, *United States* v. *Dougherty,* 269 U. S. 360 (1926)].

In *United States* v. *Sutton* [245 F. Supp. 357 (D. C. Md. 1965)] petitioner's argument was recently raised and similarly rejected, the court deciding that a federal prosecution for transporting falsely-made money orders across state lines was permissible following an acquittal in State court for larceny of those funds. Many other cases also exist in which a continuous criminal intent was implicitly deemed irrelevant to the double jeopardy claim [see, *Ebeling* v. *Morgan,* 237 U. S. 625 (1915)—separate punishments for cutting of several mail bags at the same time and place; *Hoag* v. *New Jersey,* 356 U. S. 464, 467 (1958)—separate convictions for each of four robberies committed at the same time; *United States* v. *Michener,* 331 U. S. 789 (1946)—separate punishment for making counterfeit plates and possessing those plates with intent to use them; *United States* v. *Adams,* 281 U. S. 202 (1930)—separate prosecution for making false entries in books of a bank to show a credit, and then for making false entries in a report to show the same credit]. Indeed, even in *People* v. *LoCicero,* this Court held that the kidnaping of the driver of the hijacked truck was not barred from prosecution [14 N. Y. 2d at 379, *supra*], though presumably the same criminal intent that underlay the robbery motivated the internment of the victim.

In summary, then, it is quite clear that this larceny prosecution in New York is not barred on the grounds of

double jeopardy. Manifestly, the statutes are different, each having elements which the other does not. Similarly, the act and evidence of larceny is not essential to satisfy the Federal statute, nor are the acts or evidence essential to prove devising a scheme to defraud or use of wire facilities required to show a criminal caption and asportation.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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